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No. 96 255 AUG 1 2 1996

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1995

ELSA MACDONALD,

Petitioner,

against

DELAWARE COUNTY BOARD OF SUPERVISORS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are the lower federal courts authorized to approve weighted voting in county legislative bodies as an alternative to the population-based apportionment of representatives which this Court has required in every case since 1964?

LIST OF PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed are:

Elsa MacDonald
Roxbury Taxpayers Alliance
Edward V. S. Moore
Susan E. Moore
Delaware County Board of Supervisors.

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No.

In The

Supreme Court of the United States

October Term, 1995

ELSA MacDONALD,

Petitioner,

vs.

DELAWARE COUNTY BOARD OF SUPERVISORS,

Respondent.

Petition for a Writ of Certiorari
to
The United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Elsa MacDonald respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 80 F.3d 42 and is reproduced in the appendix annexed hereto at App. 1a.

The opinion of the United States District Court for the Northern District of New York is reported at 886 F.Supp. 242, and reproduced at App. 17a.

JURISDICTION

The court of appeals entered its judgment on March 21, 1966. Petitioner filed a motion for rehearing in the court of appeals on April 2, 1996, which was denied by order entered May 20, 1996, a copy of which appears at App. 46a.

Jurisdiction is conferred by 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner commenced this action to secure reapportionment of the respondent Board of Supervisors, which is the legislative body of Delaware County, New York, in accordance with the "one person, one vote" command of the Fourteenth Amendment. Federal jurisdiction is conferred by 28 U.S.C. §§ 1331 and 1343.

Delaware County has nineteen towns, ranging in population from 550 to 6,667.

The board is composed of one supervisor elected from each town, regardless of population.

The functions of the members of the board include voting on proposed measures, serving on committees, floor discussions, introducing resolutions, notices and motions,

and communications among themselves and with constituents and other officials.

When the board votes on a measure, but not for other activities, it uses a system of weighted voting under which each supervisor is given a number of votes which is substantially proportional to the population of his or her town.

The board instituted weighted voting in response to the Court's "one person, one vote" decisions.

The legislative bodies of some twenty other New York counties are structured similarly and use similar systems of weighted voting.

Petitioner resides in Delaware County's most populous town. She seeks to invalidate the present apportionment of the board, and to require development of a system of apportionment under which her representation on the board is equal to that of residents of the less populous towns.

The district court granted summary judgment for the board, and the court of appeals affirmed. Both courts held that Delaware County's system of weighted voting satisfies the constitutional requirement of "one person, one vote" as explicated in this Court's apportionment decisions.

REASONS FOR GRANTING THE WRIT

The decision below is in direct conflict on an important constitutional matter with the Court's decisions beginning with *Reynolds v. Sims*, 377 U.S. 533 (1964), and applied to local legislative bodies in such cases as *Abate v. Mundt*, 403 U.S. 182 (1971), and *Board of Estimate v. Morris*, 489 U.S. 688 (1989).

1. The Court's Decisions Require That *Seats* — Not Votes — In Local Legislative Bodies Be Apportioned On The Basis Of Population.

In *Reynolds v. Sims*, *supra*, the Court stated:

> "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id* at 568.

Most recently, in the local government context of *Board of Estimate v. Morris*, *supra*, the Court stated that it "has *insisted* that seats in legislative bodies be apportioned to districts of substantially equal populations. [emphasis added]" 489 U.S. at 694.

Exact equality is not required, but since *Reynolds v. Sims*, *supra*, the Court has approved no system which makes no effort to apportion *seats* on the basis of population to a substantial extent.

The Delaware County system does not apportion the seats on a population basis to any extent.

The court of appeals' endorsement of weighted voting in a county legislature, as a constitutionally adequate alternative to *any* degree of population-based apportionment of the representatives, is a frontal assault on this Court's body of apportionment decisions.

2. The Court Of Appeals Refused To Apply The Formula That The Court Has Utilized Without Exception Since 1971.

In *Board of Estimate v. Morris, supra*, the Court held that the members of the New York City Board of Estimate were not sufficiently apportioned by population.

To reach this conclusion the Court applied "the formula that we have utilized without exception since 1971," *Id* at 700, to calculate "the maximum percentage deviation from the ideal population . . . ." *Id.*

The Court's formula requires computation of the percentage by which each district's population per legislator exceeds or falls below the ideal, defined as the mean population per legislator of the entire jurisdiction. The percentage which most exceeds the mean is added to the percentage which falls farthest below the mean, and the sum of the percentages is the "maximum" or "total" deviation from the ideal. See *Board of Estimate v. Morris, supra*, 489 U.S. at 700, n. 7; *Abate v. Mundt, supra*, 403 U.S. at 184.

The Court has applied the same formula, regardless of whether the system under review involves single member legislative districts, like the one at bar, or multi-member districts as in *Abate v. .Mundt, supra*.[1]

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1. For single member districts the computation is simplified because each district's population-per-legislator equals its population. See *Board of Estimate v. Morris, supra,* at 700, n. 7. The computation is more complex for multi-member districts as in *Abate v Mundt, supra.* In *Abate,* the county's mean population-per-representative was 12,156 (county population of 218,804 ÷ 18 representatives). The population-per-representative of the most under-represented district, Orangetown, was 13,020 (population 52,080 ÷

In *Abate v. Mundt*, *supra*, the Court approved a local government plan in which the total deviation from equality of population-per-legislator was 11.9%.

In the most recent local government case, the Court stated that "no case of ours has indicated that a deviation of some 78% could ever be justified." *Board of Estimate v. Morris*, *supra*, at 702.[2]

In the present case the maximum percentage deviation from ideal equality, computed as in *Board of Estimate v. Morris*, *supra*, at 700, n. 7, is 246.1%.[3]

Despite the Court's reference in *Morris* to the formula used "without exception since 1971," *Id* at 700, the court of appeals stated that the Court "has declined to set forth a definitive formula for measuring deviation at the local

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[Footnote continued from previous page]

centage points above. The population-per-representative of the most over-represented district, Clarkstown, was 11,577 (population 57,883 ÷ 5 representatives), which was 95.2% of the county-wide mean, or 4.8 percentage points below. See 403 U.S. at 185 & n. 1. The Court summed 7.1 and 4.8 to arrive at 11.9%, the "total deviation from population equality." *Id* at 184.

2. The Court held that such a substantial deviation could be sustained, if at all, only if the local government carried a "very difficult burden" of justification. *Id*. The Court rejected the board's contentions that the deviation was justified in order to "accommodate natural and political boundaries as well as local interests," *Id*, or by "exigencies of history or convenience." *Id*, n. 10.

5. The mean population of Delaware County's towns is 2,486 (47,227 ÷ 19).

The Town of Sidney's population of 6,667 exceeds the mean by 168.2%. (6,667 – 2,486 = 4,181 ÷ 2,486 = 1.682 = 168.2%).

The Town of Bovina's population of 550 is 77.9% below the mean. (550 – 2,486 = –1,936 ÷ 2,486 = .779 = 77.9% below mean).

The maximum deviation = 168.2% + 77.9% = 246.1%.

level." (App., 14a).[4]

The court of appeals disregarded this Court's formula and instead used a formula of its own which produced a deviation of only 0.92%, compared with 246.1% using this Court's method. (App., 14a – 15a).[5]

In contrast to *Morris,* the formula used by the court of appeals was limited to evaluating whether the members' votes within the board are allocated substantially on the basis of population.

The court of appeals did not measure or give weight to the ten-fold disparity in the numbers of people who elect and are represented by the board members.

The court of appeals' exclusive focus on whether the members' votes are proportionately weighted is in direct conflict with this Court's "insiste[nce] that seats in legislative bodies be apportioned to districts of substantially equal populations." *Board of Estimate v. Morris*, *supra*, at 694.

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4. For this statement the court of appeals cited *Mahan v. Howell*, 410 U.S. 315, 329 (1973), and *Roman v. Sincock*, 377 U.S. 695, 719 (1964), neither of which supports its decision. In *Mahan*, the Court upheld a system having a "16-odd percent maximum deviation," 410 U.S. at 329, saying, "While this percentage may well approach tolerable limits, we do not believe it exceeds them." *Id.* In *Roman*, the Court stated that the courts are to insure "faithful adherence to a plan of population-based representation" with "minor deviations only . . . ." 377 U.S. at 710.

5. The district court below acknowledged that a "population-based analysis . . . produces a total deviation of 246.1%." (App., 39a).

3. Weighted Voting Is Not A Constitutionally Adequate Alternative To Population-Based Apportionment Of Seats.

The court of appeals contended that while *Morris* "indicated a preference for electoral districts of equal population, it did not foreclose the use of flexible systems with respect to the election of local officials, and it did not involve weighted voting." (App., 14a).

To be sure, *Morris* does not foreclose a substantial degree of flexibility at the local level, but *Morris* and all of the Court's decisions leading up to *Morris* foreclose a system of apportionment which is not population-based to any extent, and which results in a total deviation from ideal equality of over 200%, according to the formula invariably applied by this Court.

There is no merit in the court of appeals' attempt to distinguish this Court's decisions on the ground that they did not involve weighted voting. (App., 14a).

It is true that none of the Court's prior decisions invloved a weighted voting system like that at bar, although in *Morris* the votes of at-large members of the Board of Estimate were weighted. See 489 U.S. at 694.

However, since *Reynolds v. Sims*, *supra*, the Court has reviewed a wide variety of apportionment systems and in every case has adhered to the "basic constitutional standard," *Id*, 377 U.S. at 568, that the *seats* in legislative bodies at all levels of state and local government must be apportioned on a population basis to a substantial degree.

4. Weighted Voting Supplies No Equality Of Representation With Regard To The Important Non-Voting Functions Of The Members Of The Board Of Supervisors.

The decision below conflicts with pre-*Morris* decisions of two three-judge district courts.[6] These courts held that weighted voting in state legislatures failed to supply constitutionally required equality of representation, because weighted voting supplies no equality with respect to the non-voting functions of representatives.[7]

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6. *Bannister v. Davis,* 263 F.Supp. 202, 209 (E.D. La. 1966)(per Circuit Judge Wisdom); *WMCA v. Lomenzo,* 238 F.Supp. 916 (S.D.N.Y. 1965)(per Circuit Judge Waterman), vac. in part as moot, 384 U.S. 887 (1966).

7. In *Bannister v. Davis, supra,* the court wrote:

> "In fractional and weighted voting systems, each parish elects one representative, but the weight of the vote cast by each representative is keyed to the population of his district. This sort of system overlooks the fact that a representative does more than simply vote for legislation. He exerts personal influence on other representatives, serves on committees, takes part in caucuses, and must make himself available to his constituents. One representative from a large district, therefore, would not be as effective as would several representatives from the same area, regardless of the fact that his voting power is apportioned according to the number of people he represents. Individuals in a large district would not have the same voice in the consideration of legislation as would individuals in a smaller district." 263 F.Supp. at 209.

In *WMCA v. Lomenzo, supra,* the court stated:

> "If voting were the only important function of a legislator, the scheme of fractional voting in Plans D and C would probably not offend 'the basic standard of equality among districts.' But legislators have numerous important functions that have nothing directly to do with voting: participation in the work of legislative committees and party caucuses, debating on the floor of the legislature, discussing measures with other legislators and executive agencies, and the like." 238 F.Supp. at 923.

Except for the lower courts here, courts and commentators have uniformly regarded *Board of Estimate v. Morris, supra*, as signaling that weighted voting in local bodies is not a constitutionally adequate substitute for population-based apportionment of seats.[8]

The court of appeals acknowledged petitioner's contention that weighted voting did not supply equal representation with regard to the supervisors' non-voting functions such as committee work and floor debates, and that supervisors from less populous towns have disproportionate ability to influence county legislation. (App., 5a).

However, the court did not address the significance of petitioner's contentions, and did not reconcile the disproportionate influence of supervisors from less populous towns with the fourteenth amendment's guarantee of equal representation on local legislative bodies.

The constitutional question posed in this case has clouded the legitimacy of numerous county legislatures in New York, and perhaps elsewhere, throughout the decades since *Reynolds v. Sims, supra*,[9] and particularly since the Court's decision in *Board of Estimate v. Morris, supra*.

The affected counties contain scores of thousands,

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6. See *Jackson v. Nassau County Board of Supervisors,* 818 F.Supp. 509, 531-2 (E.D.N.Y. 1993), and cases collected at *id,* 534; see also Gelfand & Allbritton, *Conflict and Congruence in One-Person, One-Vote and Racial Dilution Litigation: Issues Resolved and Unresolved by Board of Estimate v. Morris,* 6 J.L. & Pol. 93 (1989), at 113, nn. 106-7.

9. In the wake of *Reynolds* seats in the legislative bodies of many upstate New York counties were apportioned on the basis of population, as in *Abate v. Mundt, supra.* However, it appears that "more than twenty" counties opted instead for weighted voting. Gelfand & Allbritton, *Op. Cit.* at 112.

perhaps millions, of citizens who, if petitioner is correct, do not receive constitutionally guaranteed equality of represe-nation.

The Court should take this opportunity to settle the question of whether weighted voting in county legislative bodies supplies the equality of representation guaranteed by the fourteenth amendment.[10]

CONCLUSION

The petition should be granted for the reasons stated.

---

10. The court of appeals regarded petitioner as contending that "weighted voting is *per se* unconstitutional," because she acknowledged that the supervisors' votes are weighted in proportion to population. (App., 13a). The court held that a *per se* challenge was foreclosed by this Court's summary dismissal of the appeal in *Franklin v. Krause*, 32 N.Y.2d 234 (1973), app. dism'd., 415 U.S. 904 (1974). (App., 13a).

Petitioner has no quarrel with weighted voting *per se,* only with its use as a substitute for all population-based apportionment of representatives. The complaint attacks the "system of electing one representative to the board from each of nineteen towns of grossly disparate population . . . ," (Cplt., ¶ 10), and contains no mention of weighted voting.

In any event, unlike Delaware County, the Nassau County board involved in *Franklin v. Krause, supra,* apportioned its representatives on a population basis to a substantial extent by allotting two seats to the most populous town (Hempstead), and one seat to each of the less populous towns. In addition (not instead), the representatives' votes were weighted. *Franklin* therefore posed no issue concerning whether weighted voting would supply constitutionally required equality in the absence of any degree of population-based apportionment of seats.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DECIDED MARCH 21, 1996.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 684—August Term, 1995

(Argued: December 21, 1995

Decided: March 21, 1996)

Docket No. 95-7545

ROXBURY TAXPAYERS ALLIANCE, SUSAN E. MOORE, EDWARD V.S. MOORE, and ELSA MACDONALD,

Plaintiffs-Appellants,

—v.—

DELAWARE COUNTY BOARD OF SUPERVISORS,

Defendant-Appellee.

Before:

KEARSE, MAHONEY and PARKER,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Northern District of New York, Thomas J.

McAvoy, *Chief Judge*, summarily dismissing complaint under 42 U.S.C. § 1983 alleging that county apportionment plan violates Equal Protection Clause of the Fourteenth Amendment. *See* 886 F. Supp. 242 (1995).

Affirmed.

HERBERT JORDAN, Roxbury, New York (Randlett Walster, Jordan & Walster, Roxbury, New York, on the brief), *for Plaintiffs-Appellants*.

RICHARD B. SPINNEY, County Attorney, Stamford, New York, *for Defendant-Appellee*.

KEARSE, *Circuit Judge*:

Plaintiffs Roxbury Taxpayers Alliance ("Roxbury Alliance" or "Alliance") *et al.* appeal from a judgment of the United States District Court for the Northern District of New York, Thomas J. McAvoy, *Chief Judge*, dismissing their complaint under 42 U.S.C. § 1983 (1994), alleging that the method of electing members of defendant Delaware County Board of Supervisors (the "Board") violates their rights under the Equal Protection Clause of the Fourteenth Amendment. The district court denied a motion by plaintiffs for summary judgment and instead granted summary judgment dismissing the complaint on the grounds that most of the plaintiffs lacked standing and that the undisputed facts showed that the

challenged system provides fair and effective representation for all Delaware County citizens. Plaintiffs pursue their equal protection claim on appeal. Finding no merit in their contentions, we affirm.

I. BACKGROUND

The facts do not appear to be in dispute. Delaware County ("Delaware" or the "County"), organized by the New York State legislature in 1797, is one of New York's 62 counties and covers an area of 1460 square miles in the central region of the State. According to the 1990 census, the County has a total population of 47,225, spread over 19 towns that have disparate numbers of residents. The smallest town is Bovina with a population of 550; the largest is Sidney with a population of 6,667. The mean population of Delaware's towns is 2,486. The County is governed by its 19-member Board of Supervisors, with each member (or "Supervisor") elected by the citizens who reside in his or her town.

The plaintiffs in the present action are Roxbury Alliance, an unincorporated association organized to monitor compliance by County officials with local laws; Susan E. Moore and Edward V.S. Moore (the "Moores"), who are residents of the Town of Middletown (population 3,406); and Elsa MacDonald who is a resident of Sidney. Plaintiffs contended that the County's use of single-member voting districts of disparate populations impermissibly dilutes the votes of those citizens residing in towns with larger-than-average populations. They sought a declaratory judgment that the system of electing one representative from each town violates the Equal

Protection Clause and an injunction requiring reapportionment of the voting districts.

The Board defended on the ground that, notwithstanding the single-member voting districts of disparate populations, there is no disparity in County citizens' voting power because since 1976 the Board has used a computer-projected method of weighted voting that entitles each Supervisor to a number of votes that closely approximates the relative population of his of her voting district, based on the most recent census. Local Law No. 4, which went into effect in January 1992, provides that a total of 3,480 votes are available for proposed County legislation whose passage by the Board requires the affirmative vote of a simple majority; a total of 2,428 votes are available if a two-thirds majority is needed; and a total of 2,244 votes are available if a three-fifths majority is needed. Local Law No. 4 allocates the available votes, for each type of vote taken by the Board, to the Board members in proportion to their respective towns' populations based on the 1990 census.

For example, as to proposed County legislation needing the affirmative vote of a simple majority, the Supervisor representing Bovina (population 550) is allocated 39 votes, which he or she must cast as a bloc; the Bovina Supervisor has, instead, 28 votes when a two-thirds majority is needed, and 27 votes when a three-fifths majority is required. In comparison, the Supervisor representing Sidney (population 6,667) has 468 votes when a simple majority is needed, 358 votes when the affirmative vote of two-thirds of the Board's total votes is required, and 308 votes when a three-fifths majority is needed. Thus, where a resolution requires a simple majority of votes for passage, the representative elected by Bovina, which has approximately 1.17% of the

County's total population, controls 39 of 3480 votes, or 1.12%; the representative from Sidney, which has some 14.12% of the County's population, is entitled to cast 13.45% of the total number of votes. In sum, as plaintiffs acknowledged, "[w]hen voting, the board uses a weighting system under which each member casts a vote which is essentially proportionate to the population of his or her town." (Plaintiffs' Statement Pursuant to Local Rule 10(j) in support of their motion for summary judgment ("Plaintiffs' Rule 10(j) Statement") ¶ 9.)

Based on the undisputed facts, plaintiffs moved for summary judgment, arguing that the Equal Protection Clause requires that local legislators be elected from districts of roughly equal population and that the County's desire to preserve the integrity of town boundaries could not override that constitutional requirement. Plaintiffs contended that weighted voting was insufficient to meet this standard in light of the Supreme Court's decision in *New York City Board of Estimate v. Morris*, 489 U.S. 688 (1989) ("*Morris II*"), *aff'g* 831 F.2d 384 (2d Cir. 1987) ("*Morris I*"). Plaintiffs also contended that weighted voting was insufficient to assure them equal representation because, given the Supervisors' equal ability to participate in, *inter alia*, floor debates and committee work, Board members from less populous towns had disproportionate ability to influence County legislation.

The Board opposed summary judgment, contending, *inter alia*, that Delaware's present apportionment plan met the federal constitutional standard of "one person, one vote" because voting power on the Board was distributed among districts in proportion to their respective populations. The Board argued that Local Law No. 4 preserved the ability of towns comprising a majority of the County's population to pass legislation, while main-

taining the Board's small size and assuring that each town, no matter how small, has a proportionate share of representation. The County also noted that its plan conformed to New York State's Municipal Home Rule Law, which authorizes a county to adopt a voting plan that (a) "provide[s] substantially fair and effective representation for the people of the local government" and (b) includes "[r]epresentation areas [that are] of convenient and contiguous territory in as compact form as practicable." N.Y. Mun. Home Rule Law §§ 10.1.a(13)(a)(iii) and (iv) (McKinney 1994). The Board submitted the affidavit of the Supervisor of the Town of Davenport (population 2,438) in support of, *inter alia*, the Board's contentions that the present system provides greater efficiency than would be allowed by the reapportionment that plaintiffs' request, and that it gives no Supervisor the power to prevent a Board vote on any proposed legislation.

In a Memorandum-Decision & Order dated May 13, 1995, reported at 886 F. Supp. 242, the district court denied plaintiffs' motion for summary judgment and granted judgment for the County as a matter of law. Citing *League of Women Voters v. Nassau County Board of Supervisors*, 737 F.2d 155 (2d Cir. 1984) ("*League of Women Voters*") (§ 1983 action available only to those who can assert infringement of a "personal" constitutional right), *cert. denied*, 469 U.S. 1108 (1985), the court ruled that Roxbury Alliance lacked standing to bring the present action because the rights asserted were not personal to the Alliance. The court also ruled that the Moores lacked standing because they resided in a voting district, Middletown, that had 7.21% of the County's total population and was allocated approximately 7.30%

of the Board's weighted votes, and hence was not underrepresented under the County's apportionment plan.

Turning to the merits, the district court noted that prior to the *Morris* cases, this Court, in *League of Women Voters*, 737 F.2d at 167, had clearly held that weighted-voting plans were not *per se* unconstitutional. The district court noted that "*Morris* was not a true weighted voting case," 886 F. Supp. at 249, and that *Morris II* had

> affirmed the standard articulated in *Reynolds [v. Sims*, 377 U.S. 533 (1964)], that the relevant inquiry when testing the constitutionality of apportionment plans is that the vote of any citizen must be approximately equal in weight to that of any other citizen, and that the goal is to provide fair and effective representation to all citizens.

886 F. Supp. at 252. The district court stated that

> the [*Morris II*] Court chose to focus the relevant inquiry on the comparative "weight" of the citizens' votes. Had the Court intended to rely exclusively on districts of equal population, it would surely have based the relevant inquiry simply on the population of each district. . . . Thus, while the Supreme Court may prefer electoral districts of equal population, local governments still have the flexibility to organize themselves in ways that meet the needs of the local communities, as long as they are within reasonable constitutional parameters.

Id. at 251.

The court found that the constitutional standard was met in the present case. It rejected plaintiffs' method of calculating the County's deviation from the mean pop-

ulation, in which plaintiffs added the percent by which Sidney's population exceeds the mean to the percent by which the mean exceeds Bovina's population; the court found that this did not provide "the relevant measure of whether the votes of the citizens of Delaware County are weighted equally." *Id.* at 253. Rather, the court concluded that a comparison of the "percentage of actual votes allocated to each representative against the percentage of the county population in each district" more accurately measured the relative voting power of the members of the Board. *Id.* Using this approach, the court noted that "the most over represented town is Andes, with 2.737% [*sic*: 2.734%] of the total population and 2.988% of the votes, producing a deviation of 0.25 . . . [, and] the most underrepresented town is Sidney, with 14.117% of the total population and 13.448% of the total votes, producing a deviation of -0.67." *Id.* at 253-54. Thus, the "total deviation is less than 1% (0.92) from population equality," a number "clearly within the permissible constitutional range." *Id.* at 254. The court noted that

> [t]he system of apportioning votes to town supervisors in proportion to the town population is relatively easy to understand, and . . . . is based on real votes and real populations, rather than on a theoretical model of voting coalitions. Most importantly, no single town has close to 50% of the votes, and no supervisor can therefore dominate the board. As a result, the weighted voting plan relies on the fundamental democratic practice of having simple majorities decide the great majority of its votes, and conventionally calculated "supermajorities" decide on a small number of particularly important measures. No single group of voters are permanently

> underrepresented in proportion to their numbers, and even the smallest political unit has a meaningful say in the decisions of the board.

Id. Noting plaintiffs' concession that "[w]hen voting, the board uses a weighting system under which each member casts a vote which is essentially proportionate to the population of his or her town" (Plaintiffs' Rule 10(j) Statement ¶ 9), the court concluded that the County's system of allocating weighted votes among the members of its Board of Supervisors assured both quantitative and qualitative equality of representation.

Judgment was entered dismissing the complaint, and this appeal followed.

II. DISCUSSION

On appeal, plaintiffs pursue their contention that the County's weighted-voting system violates the individual plaintiffs' rights to equal protection. We conclude that their contentions are without merit substantially for the reasons stated by the district court.

Preliminarily, we note that plaintiffs have not argued that the district court erred in ruling that the Alliance lacks standing in the present suit. Accordingly, that ruling will not be disturbed, *see, e.g., Day v. Morgenthau*, 909 F.2d 75, 76 (2d Cir. 1990), *cert. denied*, 506 U.S. 821 (1992); and given the unchallenged dismissal for lack of standing, the Alliance has no standing on this appeal to challenge the district court's ruling on the merits. With respect to the Moores, there is no dispute that their town has 7.21% of the County's residents and that the weighted-voting system gives their representative 7.30% of the Board's total votes. To have standing, a

plaintiff has the burden of showing that he or she suffers an "injury in fact" that is "fairly . . . trace[able] to the challenged action of the defendant." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). The district court correctly ruled that since the Moores reside in a town that is slightly over-represented on the Board, they have shown no such injury to themselves and hence they lack standing. *See, e.g., League of Women Voters*, 737 F.2d at 161. Accordingly, we turn to the merits of the case with respect to MacDonald, the plaintiff who has standing.

In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court held that "as a basic constitutional standard, the Equal Protection Clause requires that the seats in . . . [a] state legislature must be apportioned on a population basis." *Id.* at 568. The Court reasoned that

> if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. . . . The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.

Id. at 562-63. The Court stated that "[p]opulation is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." *Id.* at 567. The Court's ultimate conclusion was that "an individual's right to vote . . . is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Id.* at 568.

These principles apply to local as well as state governments. *See, e.g., Morris II*, 489 U.S. at 692-93; *Abate v. Mundt*, 403 U.S. 182, 185 (1971); *Hadley v. Junior College District*, 397 U.S. 50, 58 (1970) ("[T]he guarantee of equal voting strength for each voter applies in all elections of governmental officials."); *Avery v. Midland County*, 390 U.S. 474, 481 (1968).

When representatives are elected from districts of equal populations, each citizen enjoys the right to his or her fair share of representation on the body comprising those representatives:

> "[t]he personal right to vote is a value in itself, and a citizen is, without more and without mathematically calculating his power to determine the outcome of an election, shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two; or to put it another way, if he may vote for one representative and the voters in another district half the size also elect one representative.

Morris II, 489 U.S. at 698. As was stated in *Morris I*, the emphasis on equality of population is designed to protect each voter's "share" of representation on the governmental body. The "one person, one vote" standard "forbids arrangements under which the voting strength of

voters in one or more small districts outweighs the voting strength of voters in one or more large districts and district representatives exercise substantial voting power within the elected body." 831 F.2d at 394 (Newman, *J.*, concurring).

The Constitution may, however, tolerate a degree of deviation from strict population equality in elections where such deviation is necessary to meet changing local needs. As the Court explained in *Hadley*, "[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions." 397 U.S. at 59 (internal quotation marks omitted). Where such deviation from mathematical equality is more than *de minimis*, a court is to scrutinize the state interests offered to justify the deviation, evaluating "the character as well as the degree of deviations from a strict population basis." *Reynolds*, 377 U.S. at 581. Considerations such as a desire to preserve local political subdivisions, particularly when applied "in a manner free from any taint of arbitrariness or discrimination," *Brown v. Thomson*, 462 U.S. 835, 843 (1983) (internal quotation marks omitted), and accompanied by a long tradition of preserving those boundaries, *see id.*, are among the factors that have been recognized as warranting deviation from strict population-based election of representatives. *See, e.g., id.*; *Abate v. Mundt*, 403 U.S. at 186-87; *cf. Reynolds*, 377 U.S. at 578 ("A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme.").

When a departure from voting on a strict population basis is necessary, the use of a system that weights the

votes of the elected representatives may provide the voters of a given district with a degree of representation on the governing body that is proportionate to the percentage that the district's population bears to the population of the political unit as a whole. In *League of Women Voters*, we rejected a contention that weighted voting was *per se* unconstitutional, based on the Supreme Court's action in an appeal from the decision of the New York Court of Appeals, upholding a weighted-voting system, in *Franklin v. Krause*, 32 N.Y.2d 234, 344 N.Y.S.2d 885 (1973), *appeal dismissed*, 415 U.S. 904 (1974). We noted that in *Franklin*, the first question presented to the Supreme Court by the appellants was " '[w]hether weighted voting is unconstitutional *per se* as a plan of permanent apportionment for a unicameral, County legislative body having general governmental powers.' " *League of Women Voters*, 737 F.2d at 164 (quoting appellants' Jurisdictional Statement). The Supreme Court dismissed the *Franklin* appeal for want of a substantial federal question. Such a dismissal constitutes a decision on the merits of the case. *See generally Hicks v. Miranda*, 422 U.S. 332 (1975). Accordingly, in *League of Women Voters*, we followed the precedent set by *Franklin* and ruled that computerized weighted voting in a local legislative body with general governmental powers was not unconstitutional *per se*.

Given the concession by plaintiffs in the present case that under the weighting system used by the Delaware Board "each member casts a vote which is essentially proportionate to the population of his or her town," we regard the present action as one contending that weighted voting is *per se* unconstitutional. We reject that contention on the authority of *Franklin* and *League of Women Voters*. Plaintiffs' reliance on *Morris II* is mis-

placed. While *Morris II* indicated a preference for electoral districts of equal population, it did not foreclose the use of flexible systems with respect to the election of local officials, and it did not involve weighted voting.

Even had plaintiffs not conceded that the vote allocations made by Local Law No. 4 are essentially proportionate to the populations of the respective towns, we would uphold the district court's finding that the degree of deviation from the mean in the present case is *de minimis* and passes constitutional muster. While the Supreme Court has indicated, in cases that did not involve weighted voting, that there may be a maximum percent deviation beyond which no locality could justify the population disparities of its voting districts, *see, e.g.*, *Morris II*, 489 U.S. at 702 ("[N]o case . . . has indicated that a deviation of some 78% could ever be justified."), it has declined to set forth a definitive formula for measuring deviation on the local level. *See, e.g.*, *Mahan v. Howell*, 410 U.S. 315, 329 (1973) ("Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause . . . the mathematical formula that establishes what range of percentage deviations is permissible, and what is not."); *Roman v. Sincock*, 377 U.S. 695, 710 (1964) ("[T]he problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme."). In *League of Women Voters*, we endorsed a method of calculating deviation from mean population that compared the percent of total population represented by a given local official to the percent of weighted votes allocated to that official, noting that such a measure was appropriate for

"a complex weighted voting system" that allowed for the flexibility necessary to local governance. 737 F.2d at 171. In that case, we concluded that the resulting maximum deviation of 7.3% comported with the principle of population equality embodied in the one-person-one-vote rule.

Using that method in the present case, the district court properly concluded that Delaware County's system of distributing weighted votes among the members of the Board of Supervisors also comports with these constitutional standards. Local Law No. 4 allocates votes among Board members based strictly on the population represented by each Supervisor as shown by the 1990 census; voters from a given district thus may, in essence, elect a representative whose voting power on the Board is commensurate with the relative population of that district. As a result, there is only minimal deviation from population equality. The County's most overrepresented town, Andes, has 2.734% of the total population and 2.988% of the votes, resulting in a deviation of .25%. The most underrepresented town, Sidney, has 14.117% of the total population and 13.448% of the total Board votes, and is thus underrepresented by approximately .67%. The total deviation is .92%, a figure that is certainly within constitutional limits.

Further, it is undisputed that no one town has a majority of the county's population. Thus, although the representatives from the three largest towns could combine to effect passage of legislation by a simple majority, consistent with the aggregate population of their districts, no one representative controls a majority of the Board's weighted votes. Delaware County's apportionment plan therefore reproduces the relative voting power that would be achieved either by increasing the number

of representatives per district in proportion to the population or by redrawing boundaries so that each district comprised a population of roughly equal size.

Finally, there is nothing in the record to indicate that Delaware County's weighted-voting system provides representation that is not qualitatively fair and effective. The Board's small size allows for the efficient conduct of county business and a greater degree of flexibility than would a Board of substantially greater size. By having each town elect a representative, the County assures that the interests of every town, no matter how small, are considered by the Board, and that no town suffers from permanent lack of representation on account of its size. In this way, the County's method of local governance preserves not only traditional boundaries and local allegiances, but assures that no voter is effectively disenfranchised by reason of place of residence. The district court properly concluded that these factors justify the minimal deviation resulting from implementation of Local Law No. 4 and that the County's use of its weighted-voting system is constitutional.

There being no genuine issue of material fact in dispute, summary judgment for the Board was properly granted.

CONCLUSION

We have considered all of the standing and merits arguments presented by the plaintiffs and have found them to be without merit. The judgment of the district court is affirmed.

720—3-25-96 • USCA—80004 FY90

APPENDIX B —
OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, FILED MAY 15, 1995.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROXBURY TAXPAYERS ALLIANCE, et al.,

Plaintiffs,

94-CV-982

-against-

DELAWARE COUNTY BOARD OF SUPERVISORS,

Defendant.

APPEARANCES:

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Roxbury, N.Y. 12474
For: Plaintiffs

OF COUNSEL:
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RICHARD B. SPINNEY, ESQ.
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For: Defendant

Thomas J. McAvoy, Chief U.S.D.J.

MEMORANDUM-DECISION
& ORDER

In the case before the court, plaintiffs Roxbury Taxpayers Alliance and three voter-residents of Delaware County, challenge the system of apportionment which allocates weighted votes to members of the Delaware County Board of Supervisors. Plaintiffs allege that the system violates the one person, one vote principle implicit in the Equal Protection Clause of the 14th Amendment.

I.

A. The Parties

Plaintiff Roxbury Taxpayers Alliance is an unincorporated association concerned with voting rights and political representation in Delaware County, New York. Plaintiffs Susan E. Moore and Edward E. Moore are residents and registered voters of the Town of Middletown, Delaware County. Plaintiff Elsa McDonald is a resident and voter from the Town of Sidney, Delaware County, the most populous town in the county.

Defendant Delaware County Board of Supervisors is the county's chief legislative body. The Board of Supervisors was established pursuant to Article IX of the New York State Constitution and Article IV of the County Law of New York. It is responsible for adopting the weighted voting plan which is in use today and which is the subject of this suit.

B. Delaware County's Weighted Voting Plan

According to the 1990 census, Delaware County has a population of 47,225 and is divided into 19 townships ranging in population from 550 to 6667. In accordance with state and county laws, the registered voters in each town periodically elect one town supervisor. The elected town supervisor represents his or her town on the county Board of Supervisors. Thus, voters of each town are represented by a single member of the board, regardless of the population of the town in which they reside and vote.

Voting on the Board of Supervisors is governed by Local Law No. 4 of 1991. Under this law, votes are distributed according to each town's percentage of the total county population. For example, the Town of Bovina has a population of 550 out of a total county population of 47,225, and therefore constitutes 1.17% of the county population. Under the weighted voting plan, Bovina has 39 out of a total of 3480 votes,[1] which represents 1.12% of the total votes. The Town of Sidney, population 6667, constitutes 14.12% of the county population and has 468 votes, representing 13.45% of the total number of votes.[2]

These types of weighted voting is more prevalent in New York, where it is used by more than twenty counties, than

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1. This is the number of votes held by Bovina in the great majority of situations in which a simple majority vote is required. In the infrequent occasions when county laws require a supermajority of two-thirds and three-fifths to pass certain types of legislation, Bovina has 28 and 27 votes respectively. This constitutes 1.15% and 1.20% of the total votes.

2. The population of each town in Delaware County and the corresponding number of weighted votes is attached as Appendix 1. The percentage of population and corresponding percentage of weighted votes for each town is attached as Appendix 2.

anywhere else in the country. M. David Gefland & Terry E. Allbritton, *Conflict and Congruence in One-Person, One-Vote and Racial Dilution Litigation: Issues Resolved and Unresolved by Board of Estimate v. Morris*, 6 J. L. & Pol. 93, 112 (1989). Weighted voting was originally developed in response to the landmark case of *Reynolds v.Sims*, 377 U.S. 533 (1964). In *Reynolds* the Supreme Court found that apportionment plans in which districts of different sizes elected representatives who each had a single vote undervalued the franchise of voters in districts with populations above the mean, and impermissibly overvalued the franchise of voters in districts with populations below the mean. *Id.* at 563. The *Reynolds* Court therefore held such plans to be unconstitutional under the one person, one vote principle of the Equal Protection Clause of the 14th Amendment. *Id.* at 569.

By allocating votes in proportion to the population of the electoral district, weighted voting plans were used as a device for satisfying the one person one vote requirement, while simultaneously preserving traditional political subdivisions which often had wide variations in population.[3]

C. Procedural Posture of the Case

The parties are in substantial agreement on all issues of material fact relating to the weighted voting system in Delaware County. Plaintiffs concede that the Delaware County weighted voting plan results in each board member casting votes "which [are] essentially proportionate to the population of his or her district." (Plaintiffs' Statement Pursuant to Local Rule 10(j), ¶ 9, dated Nov. 4, 1994).

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3. For a historical analysis of the development of weighted voting plans, see M. David Gefland & Terry A. Allbritton, *Conflict and Congruence in One Person, One Vote and Racial Dilution Litigation: Issues Resolved and Unresolved by Board of Estimate v. Morris*, 6 J. L. & Pol. 93, 111-112 (1989).

Plaintiffs do not, therefore, challenge the current system as it is applied to them. Instead, the Plaintiffs have moved for summary judgment under Fed. R. Civ. P. 56, on the ground that weighted voting has been held to be per se unconstitutional by the Supreme Court in *Board of Estimate v. Morris*, 489 U.S. 688 (1989).

D. Standing

The Defendant correctly maintains that the Roxbury Taxpayers Alliance, Susan Moore and Edward Moore lack standing to bring this challenge. First, in *League of Women Voters v. Nassau County Bd. of Supervisors*, 737 F.2d 155 (2d Cir. 1984), the Second Circuit restricted organizational standing under § 1983 "by interpreting the rights [§ 1983] secures to be personal to those purportedly injured." *Id.* at 160 (citing *Aguayo v. Richardson*, 437 F.2d 1090 (2d Cir. 1974)). The Second Circuit concluded that "[n]either the language nor the history . . . [of § 1983] suggests that an organization may sue under the Civil Rights Act for the violations of rights of members." *Id.* Accordingly, the Roxbury Taxpayers Alliance, which is an association concerned with its members' voting rights and political representations, lacks standing to bring this action on behalf of its members.

Second, Plaintiffs Susan Moore and Edward Moore also lack standing, as they have failed to show injury under the weighted voting plan. In *League of Women Voters v. Nassau County Bd. of Supervisors*, the Second Circuit adopted the position of the Fifth Circuit in *Fairley v. Patterson*, 493 F.2d 598 (5th Cir. 1974), and held that plaintiffs who could not show injury by demonstrating that they were domiciled in an underrepresented voting district, "lacked standing to contest a reapportionment law." *League of Women* Voters, 737 F.2d at 161. Plaintiffs Susan Moore and Edward Moore are registered voters in the Town of Middletown which has 7.21% of the county population and

7.30% of the weighted votes.[4] Because Middletown is slightly over represented under the current plan, Plaintiffs Susan Moore and Edward Moore can not show injury and therefore lack standing to challenge the apportionment plan.

The Defendant does not dispute the standing of Plaintiff MacDonald, who is a resident of Sidney. Sidney's percentage of the county's weighted votes is marginally lower than its percentage of the county population. As such, Plaintiff MacDonald has grounds for alleging injury and therefore has standing to prosecute this action.

II.

Turning now to the merits of the claim before the Court, it is based on the theory that "the Fourteenth Amendment requires that all local legislatures be structured so that the legislators represent districts which are at least roughly equal in population. A legislature which is not so structured cannot conform to the constitutional command by using weighted voting." (Pl.'s Mem. Supp. Summ. J. at 2-3). In other words, the Plaintiff claims that there is but one method of apportionment that is constitutionally acceptable—a system based on districts of equal population—and that all weighted voting plans are per se unconstitutional. In support of this position, the Plaintiff relies on *Board of Estimate v. Morris,* 489 U.S. 688 (1989), and the recent interpretation of this case in *Jackson v. Nassau County Bd. of Supervisors*, 818 F. Supp. 509 (E.D.N.Y. 1993).

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4. While Middletown is slightly underrepresented in situations in which a two-thirds vote is required, with 7.17% of the weighted votes, the Town is over represented when a three-fifths vote is required, with 7.22% of the weighted votes. Thus, on balance, Middletown is slightly over-represented.

This Court finds Plaintiff's reliance on *Morris* to be misplaced, and that Plaintiff misinterprets the exhaustive analysis of *Morris* performed by Judge Spatt in *Jackson*. Furthermore, this Court finds that the current system of weighted voting in Delaware County satisfies the two core constitutional requirements for a plan of apportionment: (1) a quantitative requirement that guarantees that the vote of any citizen is approximately equal in weight to that of any other citizen; and (2) a qualitative requirement that the system provide fair and effective representation for all citizens. *Morris*, 489 U.S. at 701 (citing *Reynolds v. Sims*, 377 U.S. at 565–66, 576).

A. Weighted Voting Before *Board of Estimate v. Morris*

It is well settled that prior to *Morris*, both the Second Circuit and the Supreme Court had held that weighted voting plans substantially similar to that of Delaware County were constitutional. *Abate v. Mundt*, 403 U.S. 182 (1971); *League of Women Voters v. Nassau County Bd. of Supervisors*, 737 F.2d 155 (2d Cir. 1984); *Greenwald v. Board of Supervisors of the County of Sullivan*, 567 F. Supp. 200 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1433 (2d Cir. 1983); *Franklin v. Krause*, 32 N.Y.2d 234, 344 N.Y.S.2d 885, 298 N.E.2d 68 (1973), *appeal dismissed for want of substantial federal question*, 415 U.S. 904 (1974). Because these cases articulate the judicial approach to weighted voting and local government apportionment, and also because they are heavily drawn upon in the recent decisions in *Morris* and *Jackson*, it will be helpful to discuss some of these cases in detail.

1. Weighted Voting based on the Banzhaf Index

Franklin v. Krause was the leading weighted voting case before *Morris*. That case dealt with the plan of apportionment among the five towns of Nassau County, New York. Nassau County, like many of the New York counties, had

rejected a weighted voting system based on a direct arithmetic relationship between weighted votes and population. This was because Hempstead, the most populous town in the county, had 56% of the county's total population and could therefore have dominated the Board of Supervisors whenever a simple majority of votes was required. In other words, the supervisor from Hempstead would have had 56% of the votes, but would have enjoyed 100% of the voting power in the great majority of board decisions.

In order to remedy the overvaluation of Hempstead's voting power and to assure that sparsely populated areas retained a voice in the democratic process, Nassau County employed a weighted voting plan based on a system known as the Banzhaf Index.[5] This system used a computer driven statistical analysis to assign "voting power" to each representative, so that the power of each representative to affect the outcome of votes by casting the tiebreaking ballot in a theoretical number of possible voting combinations was equal to the percentage of the total county population of his or her town. For example, a representative whose district constitutes 15% of the county population would be assigned sufficient weighted votes to cast the tie-breaking

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5. This approach was first recommended in *Iannucci v. Board of Supervisors!* 20 N.Y.2d 244, 282 N.Y.S.2d 502, 229 N.E.2d 195 (1967). In making this recommendation, the New York Court of Appeals held that other methods of apportioning weighted votes were not per se unconstitutional. However, the court cautioned that weighted voting plans might create their own power inequalities. The court gave as an example a situation in which 60% of the population elected one legislator, who would have effectively 100% of the power.

vote in 15% of the board's decisions.[6]

This system was declared unconstitutional, however, by the New York State Supreme Court. *Franklin v. Krause*, 72 Misc. 2d 104, 338 N.Y.S.2d 561 (Sup. Ct. Nassau County 1972). The court criticized the "mathematical gyrations" used by the plan on the grounds that, while they preserved some voting power for the smaller political units, they did so at the expense of "the destruction of principles of majoritarean democracy." *Id.* at 108, 338 N.Y.S.2d at 565–66. The court concluded that, while this principle was not inviolate, the debasement of the rights of voters was not outweighed by the county's interest in the existing plan, as there were a number of viable alternative methods of reapportionment available to the county. *Id.*

The New York Court of Appeals disagreed and upheld the Nassau County weighted voting system. *Franklin v. Krause*, 32 N.Y.2d 234, 344 N.Y.S.2d 885, 298 N.E.2d 68 (1973). The Court began by recognizing that "the smaller communities are superenfranchised to a somewhat greater extent than the larger communities are disenfranchised." *Id.* at 237. However, the court found that the range of deviation between each town's theoretical voting power and percentage of county population in each town was only

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6. For a more detailed explanation of the Banzhaf Index, see Gefland & Allbritton, *supra* note 3, at 112; *Jackson v. Nassau County Bd. of Supervisors*, 818 F. Supp. 509, 521–22 (E.D.N.Y. 1993) (quoting Justice White's explanation of the Banzhaf method from *Whitcomb v. Chavis*, 403 U.S. 124, 162–63 (1971)); and *Greenwald v. Board of Supervisors of the County of Sullivan*, 567 F.Supp. 200, 203 (S.D.N.Y. 1983)).

7.3%,[7] and this fell within a constitutionally acceptable range based on prior case law. *Id.* In addition, the court found that the plan's requirement of "supermajorities," while admittedly being "artificial," prevented the constitutional infirmity of having one legislator with just over 50% of the votes and 100% of the power. *Id.*

The Court of Appeals justified its decision to uphold the plan despite the deviation from the ideal population equality, on the grounds that "the small board, composed of the unit Supervisors, is the most efficient form of government, and has proved to be such over the years." *Id.* at 238. The Court also recognized that the county had a legitimate interest in preserving traditional boundary lines, which facilitated local taxing and the delivery of local services. *Id.* at 241. The Court of Appeals quoted the Supreme Court in *Abate v. Mundt*, 403 U.S. 182 (1971), which upheld an apportionment plan with a deviation of 11.9%, and which recognized that local government (as opposed to state or congressional government) needed considerable flexibility in order to meet local needs, and that the "needs of a local community as a whole may sometimes justify departures from strict equality." *Franklin*, 32 N.Y.2d at

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7. The Court of Appeals methodology in calculating the range of deviation is important as it has been called into question by *Morris*.

The Court of Appeals first noted that the plan provided for a total of 130 votes to be distributed among the six supervisors, and then compared each town's *percentage of voting power* (as calculated by the theoretical Banzhaf Index) with each town's percentage of the total county population. For example, the court found that North Hempstead was the most underrepresented town in the county, as it constituted 16.5% of the county population, but had only 13% of the voting power, resulting in a deviation of 3.5%. At the other extreme was Glen Cove; with 1.8% of the county population and 5.6% of the voting power, producing a deviation of +3.8%. In order to calculate the range of deviation, the court simply calculated the difference between North Hempstead's -3.5% and Glen Cove's +3.8%, which produced a deviation range of 7.3%.

239. The Court of Appeals concluded by reaffirming that the goal of apportionment plans was to remain one person, one vote, but added that the law had "assumed a desirable practicality because it allow[ed] for flexibility—something which, at least prior to *Abate v. Mundt* was lacking." *Id.* at 242 (citation omitted).

The Supreme Court reviewed the case under its mandatory appellate jurisdiction, 28 U.S.C. § 1257(2), and dismissed it for want of a substantial federal question. *Franklin v. Krause*, 415 U.S. 904 (1974). This type of dismissal is deemed to reach the merits of the case, and creates binding precedent. *See League of Women Voters v. Nassau County Bd. of Supervisors*, 737 F.2d 155 (2d Cir. 1984) (citing *Fusari v. Steinberg*, 419 U.S. 379, 391–92 (1975) (Burger, C.J. concurring)).[8]

2. Population-Based Apportionment Plans: The Multiple Representative Approach of Abate v. Mundt.

An alternative to the theoretical Banzhaf method of satisfying the one person, one vote command of *Reynolds* was

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8. The reach and content of the precedent created by the Supreme Court's dismissal in Franklin was explored by the Second circuit in *League of Women Voters of Nassau County v. Nassau County Board of Supervisors*, 737 F.2d 155 (2d Cir. 1983). This case was a subsequent challenge to the weighted voting system in Nassau County.

In *League of Women Voters*, the Second Circuit examined the questions presented to the Supreme Court in Franklin and found that the Court had created controlling precedent that weighted voting was not per se unconstitutional. *Id.* at 167. The Second Circuit concluded that it was bound by this precedent until such time as the Supreme Court informed them otherwise, either by a direct holding or by doctrinal developments. *Id.* at 171. In addition, the court reviewed a number of cases to show that "the theme" of the Supreme Court's jurisprudence in the area of local government legislative plans "has been flexibility" in allowing local governments to organize themselves to best meet the needs of the local communities. *Id.*

affirmed by the Supreme Court in *Abate v. Mundt,* 403 U.S. 182 (1971). In *Abate* the challenged plan maintained traditional political units of differing size in Rockland County, New York by assigning differing numbers of representatives to each district according to the district's population in relation to the population of the smallest town in the county. For example, the smallest town, Stony Point, had a population of 12,114 and was assigned one representative. Orangetown, with a population of 52,080 was 4.3 times larger than Stony Point and was therefore assigned 4 representatives (fractional results being rounded to the nearest integer). The deviation from ideal population under this plan was 11.9%.[9] Again, the Supreme Court supported its decision to affirm the plan by citing the need for flexibility and a desire to preserve traditional political units. *Id.* at 185 ("viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs, . . . and that a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality").

The desire to provide for the efficient delivery of local services and the maintenance of traditional political units that formed the purpose behind the multiple representative

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9. The deviation was the result of the rounding process, and was calculated by taking the total population of the county (218,804) and dividing it by the number of representatives (18) to arrive at the mean or ideal population (12,155). The ideal population was then multiplied by the number of representatives assigned to the town, and the product was subtracted from each town's population. The result was then divided by the adjusted mean/ideal population to arrive at the percentage of deviation from ideal. For example, Orangetown had a population of 52,080, and had 4 representatives. Subtracting the adjusted mean/ideal population of 48,620 (4 x 12,155) produced 3460. By dividing this by the adjusted mean/ideal population (3460 ÷ 48,620) the Court produced a deviation of −7.1%. To calculate the maximum deviation, the Court calculated the difference between the most underrepresented and most over represented towns (−7.1 Orangetown and +4.8 Clarkstown = 11.9%).

system in *Abate* also underlies weighted voting systems. Both systems are designed to satisfy the quantitative command of one person, one vote by giving all citizens a vote of equivalent weight, while preserving the traditional political units. The two approaches differ in the method used to achieve equality of voting weight; in *Abate* the plan varies the number of representatives in each district in proportion to the size of the population, whereas in weighted voting, the number of representatives is held constant, and the votes of each representative are increased in proportion to the population of their district.[10] The latter is designed to maintain a smaller and more efficient legislature in counties in which the difference in population between the largest and smallest towns would require the election of a large number of representatives in order to ensure that the smallest town was assigned one representative. In the instant case for example, if Bovina with a population of 550 was assigned one representative, Sidney, with a population of 6667, would require twelve representatives. The legislature would be substantially larger than it is today, and the efficiency would likely suffer.

The law prior to *Board of Estimate v. Morris* was therefore clearly contrary to the Plaintiff's position. The Supreme Court had rejected the contention that weighted voting was per se unconstitutional in *Franklin v. Krause*. Jurisprudence with regard to local government apportionment systems was characterized by judicial flexibility and concern with maintaining efficient local government and preserving traditional political units. The nature of the

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10. Weighted voting plans may be distinguished by the method used to apportion the weighted votes among representatives. In the simple arithmetic model, the number of actual votes are distributed in proportion to the percentage of the total district population in each unit. In a Banzhaf-based model, the weighted votes are apportioned to each representative based on the theoretical voting power each representative should possess.

inquiry when investigating the constitutionality of local apportionment plans was based upon the one person, one vote principle as expressed in *Reynolds*, which stated that the Constitution required that the vote of any citizen be approximately equal in weight to that of any other citizen. The aim being to provide fair and effective representation for all citizens. *Reynolds*, 377 U.S. at 579.[11]

In order to bring this analysis of the law up-to-date and applying it to the case at hand, the Court must answer two questions: (1) what did *Board of Estimate v. Morris* say about weighted voting; and (2) how does the Delaware County weighted voting system comport with the constitutional standard?

B. *Board of Estimate v. Morris*

The answer to the first question, what did *Morris* say about weighted voting, is very difficult to divine. The fact is that *Morris* was not a true weighted voting case, and therefore the Court did not face head-on the issue of the constitutionality of weighted voting. The Court, however, did have occasion to address the use of the Banzhaf Index and clearly rejected it, at least as a mechanism for measuring the deviation of voting districts from population equality, and by extension, also as a method of structuring a weighted voting plan. In order to understand exactly what the Supreme Court's decision in *Morris* meant for weighted

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11. Fair and effective representation has been described by Professor Tribe in the following way: "There is a guarantee of some form of mathematical equality: every individual has the right to have her district represented in proportion to its population. There is, as well, a more elusive guarantee of fair representation: certain mathematically palatable apportionment schemes will be overturned because they systematically circumscribe the voting impact of specific population groups." L. Tribe, American Constitutional Law 1063 (2d ed. 1988) (quoted in Gefland & Allbritton, *supra* note 3 , at 119 n.137).

voting, it is necessary to examine the structure of the New York Board of Estimate and see how the defendants sought to use the Banzhaf Index as a defense.

The Board of Estimate consisted of the five New York borough presidents, plus three officials elected citywide -- the mayor, the comptroller, and the city council president. Each of the borough presidents had a single vote, even though their electoral districts ranged in size from Brooklyn, population 2,230,936, to Staten Island, population 352,151. The three citywide members were entitled to cast two votes each, except the mayor was not entitled to vote on budgetary matters. *Morris,* 489 U.S. at 690-91.

The difference in the size of the boroughs combined with the fact that each borough elected one representative who was entitled to cast a single vote, produced a maximum deviation of 132.9% from the ideal population.[12] Even when the citywide members were included in the calculation, the deviation between votes actually assigned to each district and votes that should have been assigned under an ideal system with population equality remained high at 78%. *Id.* at 701. The *Morris* Court noted that "no case of ours has indicated that a deviation of some 78% could ever be justified . . . . At the very least, the local government seeking to support such a difference between electoral districts would bear a very difficult burden, and we are not prepared to differ with the holding of the courts below that this burden has not been carried." *Id.* at 702. The Court made it clear that the board's attempt to justify the existing system based on "exigencies of history and convenience"

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12. The Supreme Court simply calculated the mean borough population (1,414,206) and then determined the percentage by which the most populous district, Brooklyn, population 2,230,936, exceeded the mean, and the percentage by which the least populous borough, Staten Island, fell below the mean.

could not outweigh the debasement of the voters' constitutional right of one person, one vote. *Id.* at 703 n.10.

Faced with the violation of the one person, one vote principle of *Reynolds*, the board first attempted to defend its system on the grounds that the board was a nonelective, nonlegislative body, and therefore was not subject to the one person, one vote rule. However both the New York Court of Appeals and the Supreme Court rejected that argument and found that the board was a legislative body, and was therefore subject to the Fourteenth Amendment. *Morris*, 489 U.S. at 692.

The board then attempted to argue that the courts below had used the incorrect methodology in calculating the deviation from the ideal population. The board argued that the citywide members should be included and the Banzhaf Index should be used to calculate the deviation from the ideal system. When the Banzhaf Index was used to calculate the power of each representative to cast a tie-breaking vote on the board, the deviation from ideal population decreased to 30.8% on nonbudget matters and, because the mayor could not vote on budgetary matters, higher on budget issues. *Id.* at 697-98.

Both the Court of Appeals and the Supreme Court rejected the board's use of the Banzhaf method in this context. They noted that the Banzhaf method was purely theoretical and failed to consider how the board actually worked in practice. The Supreme Court also criticized the method on the grounds that it was unrealistic in that it did not consider political affiliation, race or any other factors which affected the actual voting power of the electorate. *Id.* at 698-99. The Supreme Court explained:

> The personal right to vote is a value in itself, and a citizen is, without more and without mathematically calculating his power to

> determine the outcome of an election, short-changed if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two; or to put it another way, if he may vote for one representative and the voters in another district half the size also elect one representative.

Id. at 698.[13]

When the Court rejected the Banzhaf Index as a measure of deviation from ideal population, the Court reaffirmed the "population-based approach of . . . cases from *Reynolds* through *Abate*." *Id.* at 698. The Court then went on to explain exactly how these cases should be approached: "In calculating the deviation among districts, the relevant inquiry is whether 'the vote of any citizen is approximately equal in weight to that of any other citizen,' . . . the aim being to provide 'fair and effective representation for all citizens.'" *Id.* at 701 (citations omitted) (quoting *Reynolds*, 377 U.S. at 565-66).

The emphasis in *Morris* on using population as the basis of an apportionment plan, and its concern with ensuring relative equality in the weight of each citizen's vote, would clearly support weighted voting systems which adopt a population-based approach. That is, those plans that al-

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13. Justice White did not take the opportunity to consider whether this constitutional infirmity could be cured by having the citizens of the larger district elect two representatives to every one representative elected by the district half its size, or by having the representative elected from the smaller of the two districts assigned a vote in the legislature worth half of that of the representative from the district twice its size. Justice White noted that the Court was not presented with the question of the constitutionality of alternative board structures. *Morris*, 489 U.S. at 703 n.11.

locate votes to representatives in proportion to the population of their districts, and thereby ensuring that the weight of each citizen's vote is approximately equivalent to that of all other citizens. This approach can be contrasted with those weighted voting plans that use the theoretical Banzhaf Index to allocate votes based on the relative voting power of each district. The language in *Morris* clearly rejected the theoretical validity of the Banzhaf Index. This rejection not only discards the Banzhaf Index as a means of calculating the deviation of a plan from population equality, but also questions the continued viability of those weighted voting plans that are based on a theoretical *voting power* model.

The language in *Morris* also expresses the Court's concern with the qualitative goal of assuring fair and effective representation for all citizens. Thus, the Court made it clear that even if a plan is designed on a population-based model, the plan will only be constitutional as long as (1) its deviation from population equality is within a constitutionally acceptable degree, and (2) it does not substantially circumscribe or overvalue the votes of any particular population groups by, for example, granting a representative with 51% of the population 100% of the power, thereby denying the smaller political units an effective voice in government.

In reading *Morris*, there is no reason to adopt the Plaintiff's view that the Supreme Court has turned away from a flexible approach to local government organization, and is now sanctioning apportionment based on districts with equal populations as the only constitutionally acceptable system. While *Morris* includes language that may indicate a preference for a system based on equal population districts, the Court chose to focus the relevant inquiry on the comparative "weight" of the citizens' votes. Had the Court intended to rely exclusively on districts of equal population, it would surely have based the relevant inquiry simply

on the population of each district. In addition, the *Morris* Court reaffirmed the population-based approaches to apportionment in *Reynolds* and *Abate*. The Rockland County apportionment scheme that was upheld in *Abate v. Mundt* was based on districts with unequal populations. This system is theoretically similar to weighted voting, and serves the same purposes--providing all citizens a vote of equal weight, while maintaining traditional political units. Thus, while the Supreme Court may prefer electoral districts of equal population, local governments still have the flexibility to organize themselves in ways that meet the needs of the local communities, as long as they are within reasonable constitutional parameters.

There is also nothing in the language of *Morris* to support the Plaintiff's contention that the board's interest in maintaining traditional political units can no longer justify deviation from population equality (Pl.'s Mem. Supp. Summ. J. at 3). While it is true that in *Morris* the Court rejected the board's argument that history and efficiency justified a deviation from population equality of 78%, it does not necessarily follow that a desire to maintain traditional political units and local government efficiency can no longer justify smaller deviations from pure equality as they did in *Abate* and *Franklin*. In *Abate* the Court made it clear that while tradition, efficiency and absence of built-in bias could justify the 11.9% deviation from equality found in the plan, the Court added that "nothing we say today should be taken to imply that even these factors could justify a substantially greater deviation from population equality." *Id.* at 187. Thus, in rejecting these factors when used to justify a deviation of 78%, the Court in *Morris* made no doctrinal change in its approach to these factors.

The Plaintiff relies heavily on language in *Jackson v. Nassau County Board of Supervisors*, 818 F. Supp. 509 (E.D.N.Y. 1993), to find support for the proposition that the Supreme Court in *Morris* made all types of weighted voting

per se unconstitutional (Pl.'s Mem. Supp. Sum. J. at 1–3). While the decision in *Jackson* is, of course, merely persuasive authority in this Court, Judge Spatt's exhaustive analysis of the history of weighted voting and his interpretation of the Supreme Court's decision in *Morris* is particularly authoritative and deserves careful consideration. In support of the contention that all weighted voting plans are unconstitutional, the Plaintiff quotes the paragraph in *Jackson* in which Judge Spatt states:

> the Supreme Court firmly rejected weighted voting, not only because of the mathematical quagmire such a system engenders, but just as importantly because the methodology fails to take into account other critical factors related to the actual daily operations of a governing body. There is no question that the Supreme Court took the opportunity to express not only a preference, but a directive that legislators be elected by and represent citizens in districts of substantially equal size.

Id. at 532.

However, it is clear from the context of the quoted passage that Judge Spatt was referring specifically to weighted voting systems based on a theoretical Banzhaf Index, and not necessarily to other types of weighted voting plans. This is apparent from references in the quotation itself to the "mathematical quagmire" and the failure of weighted voting to consider the actual, as opposed to the theoretical daily operations of the legislature. Judge Spatt's focus is understandable, as he was dealing with a weighted voting system based on a Banzhaf Index in Nassau County.

While Judge Spatt uses sweeping language to condemn weighted voting plans based on the Banzhaf model, he does

not go so far as to state that all weighted voting plans are per se unconstitutional. In fact, Judge Spatt distinguishes his position in *Jackson* from scholars who believe that weighted voting was made per se unconstitutional in *Morris*. In discussing the opinion of Professor Scarrow, a political science professor at the State University of New York at Stony Brook, Judge Spatt opined that "[a]ccording to Prof. Scarrow, in the wake of *Morris* weighted voting can no longer be used. This Court agrees, *at least in so far as the mathematical quagmire, presently existing in Nassau County is concerned." Id.* at 535 (emphasis added). Judge Spatt then described the basic flaws in the structure of the Nassau County system: (1) the system was artificial and contrived, (2) it was incomprehensible to most citizens, (3) it could not work with a simple majority, which is a fundamental part of most democratic systems, and (4) the "supermajorities" insured that Hempstead voters were permanently underrepresented in relation to their population. Based on these flaws, Judge Spatt held that "weighted voting *as presently utilized by the Nassau County Board of Supervisors* is unconstitutional." *Id.* at 535 (emphasis added). Thus, Judge Spatt's holding was narrowly tailored to the facts of the weighted voting system in Nassau County and he did not simply declare the Nassau County system per se unconstitutional based on *Morris*.

What then is the state of the law after *Board of Estimate v. Morris*? Weighted voting systems, like that in Nassau County, which are based on a theoretical voting power analysis and which do not provide fair and effective representation for all citizens have been rejected. By extension, the method of calculating the deviation from population equality performed by the Court of Appeals in *Franklin v. Krause,* which compared each representative's theoretical voting power with the population of his or her district, has also been rejected. Replacing it is a system based on the *Reynolds–Abate* line of cases, which relied instead on a simpler population–based approach.

Nothing in the *Morris* decision indicates a departure from the Court's emphasis on flexibility in local government organization, or a departure from the Court's concern with maintaining local government efficiency and traditional political units. The Court affirmed the standard articulated in *Reynolds*, that the relevant inquiry when testing the constitutionality of apportionment plans is that the vote of any citizen must be approximately equal in weight to that of any other citizen, and that the goal is to provide fair and effective representation to all citizens. The final question before the Court remains: does the weighted voting system in Delaware County conform to current constitutional requirements?

C. The Constitutionality of the Delaware County Weighted Voting System

In approaching the question of the constitutionality of a local government apportionment plan, such as the Delaware County plan at issue here, it is useful to split the inquiry into two parts: first, a quantitative inquiry to determine whether the weight of each citizen's vote is approximately equal to that of every other citizen; and second, a qualitative inquiry to ensure that all citizens are provided fair and effective representation. As for the quantitative inquiry, if the analysis reveals a degree of deviation from population equality, this part of the inquiry should also test to see if the degree of deviation falls within the constitutionally acceptable range. This requires the court to determine whether the degree of deviation from population equality can be justified by legitimate government interests. As for the qualitative inquiry, factors to be considered in this analysis include evidence of built-in bias against any particular political interest or group; whether the method of apportionment is so complex as to confuse and alienate the voters; whether one representative has greater than 50% of the votes and effectively 100% of the power, or alternatively, whether the smaller political units are denied an effective

voice in board decisions.

1. Quantitative Analysis

There is no question in this case that the town supervisors are not elected by districts of substantially similar size. The Plaintiff's analysis, which is methodologically based on the approach of the Supreme Court in *Abate* and the Eastern District of New York in *Jackson*, reveals that the population of the largest town, Sidney, is 168.2% above the mean population, while that of the smallest town, Bovina, is 77.9% below the mean. Using a strict population-based analysis, this approach produces a total deviation of 246.1%.

This Court, however, finds that this method of analysis is not the relevant measure of whether the votes of the citizens of Delaware County are weighted equally in this case. Plaintiff's method of calculating the deviation of an apportionment plan was developed in *Abate*. In *Abate* the calculation was used to test a system in which the voting weight of citizens in districts of unequal size was equalized by assigning additional representatives to the larger districts based on the ratio of the town's population to the population of the smallest district, which was assigned one representative. In other words, this method of apportionment was used to satisfy the requirements of one person, one vote by weighting the votes of each district in proportion to its population by assigning more representatives with a single vote to each district, rather than keeping the number of representatives constant and weighting each representative's number of votes in proportion to the population of the district. If Delaware County was required to use the *Abate* method to achieve its goal of retaining the traditional political units, the Board of Supervisors would be large and unwieldy, with over 85 members. To force Delaware County into this inefficient method of apportionment would run counter to the very flexibility that the Supreme Court

was trying to encourage in *Abate*. Inflexibly using this method to calculate the deviation from population equality of all electoral systems will simply invalidate all systems other than an *Abate*-type multiple representative plan or a plan designed around equal population districts. Because this approach frustrates the objective of encouraging flexibility and efficiency in local government organization, this Court declines to adopt the position that a single test is appropriate in all situations.

Being mindful of the need for flexibility and taking into consideration the local circumstances, the Court finds that the analysis employed by the Defendant is the more appropriate test in this case. The analysis employed by the board is a modification of the test used by the Court of Appeals in Franklin. In this case the board compares the percentage of actual votes allocated to each representative against the percentage of the county population in each district, whereas in *Franklin* the court compared the theoretical *voting power* of each representative against the population in each district.[14] Using the Defendant's analysis reveals that the most over represented town is Andes, with 2.737% of the total population and 2.988% of the votes, producing a deviation of 0.25. While the most underrepresented town is Sidney, with 14.117% of the total population and 13.448% of the total votes, producing a deviation of -0.67. using this method, the total deviation is less than 1% (0.92) from population equality.

This deviation is clearly within the permissible constitutional range, as defined by *Abate* and its progeny. This point is effectively conceded by the Plaintiff in the

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14. This important distinction appears to have been missed by the Defendant, which states that its test is based on the *Krause* analysis, and continues to use the loaded term "voting power" when referring to a simple arithmetic analysis of the distribution of votes (Def.'s Brief, Point II).

Statement Pursuant to Local Rule 10(j), in which she states that "[w]hen voting, the board uses a weighting system under which each member casts a vote which is essentially proportionate to the population of his or her town." (Pl.'s Statement Pursuant to Local Rule 10(j), at ¶ 9).

In addition, the Defendant offers the following arguments as justification for the weighted voting plan: (1) that natural and historical political units in the county have been the nineteen towns that today form the electoral districts; (2) that citizens identify with their towns through the school PTAs and other civic organizations; and (3) that this identification of the voters with their political units would be lost if a system of equal population districts split some communities and artificially created others. Based on the very small deviation from population equality, and the board's interest in maintaining the traditional political units, this Court finds that the current system of weighted voting satisfies the quantitative one person, one vote requirement for apportionment plans.

2. Qualitative Analysis

The weighted voting system in Delaware County appears to suffer from none of the qualitative constitutional infirmities that plagued Nassau County. The system of apportioning votes to town supervisors in proportion to the town population is relatively easy to understand, and has none of the "mathematical gyrations" that made the Nassau County system incomprehensible to all but the experts. It is based on real votes and real populations, rather than on a theoretical model of voting coalitions. Most importantly, no single town has close to 50% of the votes, and no supervisor can therefore dominate the board. As a result, the weighted voting plan relies on the fundamental democratic practice of having simple majorities decide the great majority of its votes, and conventionally calculated "supermajorities" decide on a small number of particularly important meas-

ures. No single group of voters are permanently underrepresented in proportion to their numbers, and even the smallest political unit has a meaningful say in the decisions of the board. In addition, the Plaintiff has not suggested that the plan contains any built–in bias favoring a particular political interest, race or geographic area.

In short, the details of the plan and the distribution of the votes ensure that there is nothing to prevent each citizen from receiving fair and effective representation under the current weighted voting plan. This conclusion is supported by the fact that the Plaintiff's papers have made no allegations of bias or legislative inefficiency caused by the plan.

III.

Weighted voting plans which apportion votes in proportion to the populations of the electoral districts were not made per se unconstitutional by the Supreme Court in *Board of Estimate v. Morris*. The constitutionality of each plan can only be determined by an individualized analysis of the challenged plan. This inquiry must include a quantitative one person, one vote analysis to ensure that the vote of each citizen is approximately equal in weight to that of any other citizen, and a qualitative analysis to ensure that each citizen receives fair and effective representation. The court conducting this inquiry should be guided by the desirability of affording local governments considerable flexibility in structuring municipal arrangements to meet the changing needs of their communities, and to preserve traditional political units. Because the Delaware County weighted voting system satisfies each of these requirements, this Court holds that the plan is constitutional.

The papers submitted by all parties reveal that there are no issues of material fact in dispute in this case. There was merely the one question of law regarding whether the system of weighted voting in Delaware County was consti–

tutional under the Fourteenth Amendment's Equal Protection Clause. In situations in which there is no issue of material fact in dispute and the question of law has been resolved by the court, "the weight of authority is that summary judgment may be rendered in favor of the opposing party even though that party has made no cross-motion under Rule 56." Charles A. Wright et al., 10A *Federal Practice and Procedure* § 2720, at 29 (2d ed. 1983). Accordingly, this Court finds that there are no material issues of fact in dispute, and that the Plaintiff's motion for summary judgment is rejected and the Defendant, the Delaware County Board of Supervisors, is entitled to summary judgment as a matter of law.

IT IS SO ORDERED.

Binghamton, New York
May 13, 1995

s/ Thomas J. McAvoy
Chief U.S. District Judge

Appendix 1

TOWN	1990 POP.	TABLE A (Simple)	TABLE B (2/3s)	TABLE C (3/5s)
Andes	1291	104	65	62
Bovina	550	39	28	27
Colchester	1928	146	98	93
Davenport	2438	182	124	117
Delhi	5015	364	257	236
Deposit	1824	142	92	88
Franklin	2471	183	126	119
Hamden	1144	78	58	56
Hancock	3384	253	172	161
Harpersfield	1450	109	74	70
Kortright	1410	108	72	68
Masonville	1352	106	69	65
Meredith	1513	111	77	73
Middletown	3406	254	174	162
Roxbury	2388	181	121	115
Sidney	6667	468	358	308
Stamford	2047	149	104	99
Tompkins	994	74	51	48
Walton	5953	429	308	277
Totals	47,225	3480	2428	2244
Majority		1741	1619	1347

Adopted 7/10/91; effective 8/24/91

TOWN	% OF POPULATION	% OF VOTE TABLE A	% OF VOTE TABLE B	% OF VOTE TABLE C
Andes	2.7337	2.9885	2.6771	2.7629
Bovina	1.1646	1.1207	1.1532	1.2032
Colchester	4.0826*	4.1954	4.0362	4.1444
Davenport	5.1625	5.2299	5.1071	5.2139
Delhi	10.6104*	10.4698	10.5848	10.5169
Deposit	3.8624	4.0805	3.7891	3.9216
Franklin	5.2324	5.2586	5.189S	5.3030
Hamden	2.4224	2.2414	2.3888	2.4955
Hancock	7.1657	7.2701	7.0840	7.1747
Harpersfield	3.0704	3.1322	3.0478	3.1194
Kortright	2.9857	3.1034	2.96S4	3.0303
Masonville	2.8629	3.0460	2.8418	2.8966
Meredith	3.2038	3.1897	3.1713	3.2531
Middletown	7.2123	7.2989	7.1664	7.2193
Roxbury	5.O566	5.2011	4.9835	5.1248
Sidney	14.1175	13.4483	14.7446	13.7255
Stamford	4.3346	4.2816	4.2834	4.4118
Tompkins	2.1048	2.1264	2.1005	2.1390
Walton	12.6O56	12.3276	12.6853	12.3440

Figures contained in Local Law 12 of 1991 expressed as percentage

* The court has recalculated these figures.

APPENDIX C — ORDER OF THE UNITED STATED COURT OF APPEALS DENYING REHEARING, FILED MAY 20, 1996.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of May one thousand nine hundred and ninety-six.

Roxbury Taxpayers Alliance,
Susan E. Moore, Edward V.S.
Moore and Elsa MacDonald,

Plaintiffs-Appellants,

Dkt No: 95-7545

V

Delaware County Board of Supervisors,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellants Roxbury Taxpayers Alliance etal.

Upon consideration by the panel that

decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any o

ed that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk
By:
s/Beth J. Meador
Administrative Attorney

No. 96-255

(2)

Supreme Court, U.S.
FILED
AUG 23 1996

IN THE

Supreme Court of the United States

October Term, 1995

ELSA MACDONALD,

Petitioner,

against

DELAWARE COUNTY BOARD OF SUPERVISORS,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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No. 96-255

IN THE

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October Term, 1995

ELSA MACDONALD,

Petitioner,

-against-

DELAWARE COUNTY BOARD OF SUPERVISORS,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Statement of Facts

The opinion below jurisdiction and statement of the case are correctly set forth in the petition at pages "2" and "3".

Reasons for Denying Writ

The writ should be denied for the reasons set forth in the opinion rendered by the Second Circuit 80 F. 3d 42.

POINT I: Respondent's plan of legislative apportionment meets constitutional standards.

Weighted voting is not *per se* unconstitutional *Franklin v. Krause 415 U.S. 904* (1974); *Abate v. Mundt 403 US 182 (1971)* and *Jackson v. Nassau County 818 F. Supp. 509 (E.D.N.Y. 1993).*

POINT II: Court of Appeals applied the law as set forth by this Court as the same applies to local government.

This Court laid down the principal of one man one vote in *Baker v. Carr 369 U.S. 186 (1962)* and *Reynolds v. Sims 377 U.S. 533 (1964)* and that principal was applied to local governments *Avery v. Midland County 390 U.S. 474* (1968). The same case also stands for the proposition that flexibility is to be accorded local governments in the method by which they choose to govern. Delaware County beginning in the 1960's and continuing in the mid 1970's attempted to adopt plans of weighted voting and also proposed a plan of legislative districts. All of which were rejected by the County voters. The last of those proposals having been rejected in 1976 and it was only litigation in the New York Supreme Court (Mary Ann Hoskins v. The Board of Supervisors of the County of Delaware *et al* Supreme Court Delaware County Index #8587) that the County by Court order adopted a system of weighted voting which was modified by local law #4 of 1991 to apply the 1990 census figures to the plan.

Delaware County was organized in 1797; is divided into nineteen different towns ranging in population from 550 to 6,667 according to the 1990 census. The County legislative body, The Board of Supervisors, applies a system of weighted

voting to determine the vote of a given supervisor on each issue. The system of weighted voting is not used in committee but the committee system does not permit legislation from being "bottled up". The same must be reported back to the floor for a vote. This Court has held that

> "a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality".

Brown v. Thomson 426 U.S. 835 (1983). There is further no showing that Delaware County has been arbitrary or discriminated against any individual or group in its plan of apportionment and that it has in fact attempted to preserve town boundaries and traditional methods of county representation by enacting a plan of weighted voting.

POINT III: The correct line of inquiry in determining the validity of legislative districts is the weight of citizens' vote.

The Court set forth in *Board of Estimate v. Morris 489 U.S. 688 (1989)*

> "in calculating the deviation among districts, the relevant inquiry is whether the vote of any citizen is approximately equivalent in weight to that of any other citizen".

It was undisputed in the Courts below that the town with the greatest representation was the Town of Andes having a population of 2.737% of the County's total, while its supervisor on a vote requiring a simple majority casts a vote equal to 2.9885% of the total votes cast; that town was over represented by a factor of plus 0.2548. It was undisputed that the town with

the greatest unrepresentation was the Town of Sidney having a population of 14.1175%, with its supervisor casting a vote equal to 13.4483%. In the same situation being a deviation of minus 0.6692; being a total deviation of less than 1% (0.924) which the Court of Appeals found to be within constitutional limits (Petition page "15a").

Through such a plan of weighted voting each citizen's vote is accorded substantially the same weight. Petitioner's attempt to argue here as she has in the District Court and in the Court of Appeals that somehow this Court has held weighted voting to be *per se* unconstitutional, I cannot find nor has anyone else found, to my knowledge, an opinion in this Court that so holds.

To impose a plan of legislative districts would only further separate citizens from their government by imposing another layer of government less related to the communities it would then represent.

Conclusion

This Court having previously ruled on the matters raised by the petition, petition should be denied.

Respectfully submitted,

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